

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E014 OF 2023

MARTIN ODONGO OYOMBA.....APPELLANT

VERSUS

PETER OWINO OKETCHRESPONDENT

(Being an appeal arising from the ruling/decision of Honourable S. W. Mathenge (SRM) delivered on 31/5/2023 in Bondo PMSC No. 251 of 2020)

BETWEEN

MARTIN ODONGO OYOMBA.....

OBJECTOR/APPLICANT

VERSUS

PETER OWINO OKETCHPETITIONER/RESPONDENT

JUDGMENT

1. The Appeal arises from the ruling/decision of Honourable S. W. Mathenge (SRM) delivered on 31/5/2023 in Bondo PMCSC No. 251 of 2020 wherein she dismissed the Appellant's Summons for revocation of Grant dated 21/12/2021 with costs to the Respondent/Petitioner.

2. The Appellant was aggrieved and filed a Memorandum of Appeal dated 29/6/2023 wherein he raised the following grounds of appeal.
 - i) That having made a finding of fact that the Respondent had misled the court by presentation of misleading facts and thereby the Appellant has satisfied the conditions set by Section 76 of the law of Succession Act to revoke the certificate of Grant issued to the Respondent, the learned magistrate erred in law and in fact in proceeding to invalidate the certificate of confirmation of Grant Intestate and certificate of grant issued to the Respondent.
 - ii) Having made a finding of fact that the Respondent had intermeddled with the estate of the deceased person and thereby in breach of Section 45 of the Law of Succession Act, the learned trial magistrate erred in making a finding that all such transactions undertaken by the Respondent in the absence of a valid certificate of Grant Intestate

and/or valid certificate of confirmation of grant were proper and valid in law.

- iii) That the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent has no legal capacity to distribute, divide, transfer and/or deal with the estate of the deceased in the absence of a confirmed grant as stipulated by Section 51 of the Law of Succession Act.
- iv) That the learned trial magistrate erred in law and in fact by expanding the scope of Rule 73 of the Probate and Administration Rules and thereby ignoring the express provision of the statute and in particular Sections 45, 55 and 82 of the Laws of Succession Act.
- v) That the learned trial magistrate erred in law and in fact by expanding the scope of Rule 73 of the Probate and Administration Rules and thereby ignoring the express provision of the statute and in particular Section 45, 55 and 82 of the Law of Succession Act.
- vi) That the learned trial magistrate erred in law and in fact in failing to consider whether the Appellant ranked in priority over the Respondent or whether the Appellant and the Respondent ranked equally for purposes of issuance of a certificate of Grant.
- vii) That the learned magistrate erred in law and in fact in failing to appreciate that the Appellant's objection was merited and thus entitled to reliefs sought in the objection proceedings.

viii) That the learned magistrate erred in law and in fact in addressing her mind to issues and pleadings that were neither before her or presented to her by way of evidence for determination.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).**

4. It is noted that the Appellant had filed a Summons for Revocation of Grant dated 21/12/2021 wherein he sought that the Grant issued to the Petitioner/Respondent be revoked and/or cancelled and that title to LR No. North Sakwa/Ajigo/802 held by the Petitioner be recalled for cancellation and the title to revert to the name of the deceased Michael Owino Madala. The Petitioner opposed

the said application and filed a comprehensive replying dated 6th January 2022. The Appellant/Objector filed a Supplementary Affidavit dated 23/1/2022.

5. Parties agreed to canvass the said application by way of viva voce evidence. The parties also were directed to file and exchange witness statements and documents.
6. The case proceeded for hearing in earnest on 3/5/2022 which is as follows.
7. **Martin Odongo Oyomba(PW1)** adopted his witness statement dated 21/12/2021 as his evidence in chief. He stated that he has come to court because the Petitioner misled the court that he is the son to Owino Madala yet that was false. That he urged the court to consider his case based on his witness statement. The Objector's statement dated 21/12/2021 is inter alia; that his grandfather who had two children namely Oyomba Madala and Michael Owino Madala both of whom are deceased; that Oyomba Madala was married to the late Gaudensia Oluoch who was blessed with four children namely Martin Odongo (Petitioner), Rose Awiti (deceased), John Ayanga (deceased) and Jocinta Awiti (deceased); that Michael Owino Madala was married to Domtila Ongala and were not blessed with any child; that he knows that he and the children of the late John Ayanga are the rightful beneficiaries of the estate of the late Michael Owino Madala and that he filed Succession Cause No. E156 of 2020 jointly with his nephew who is a son of John Ayanga

and that the Grant is yet to be confirmed; that the Petitioner herein is not a member of the entire Madala family and that he concealed material facts when he sought the letter from the chief North Sakwa when he obtained the introductory letter.

On cross examination he stated inter alia; that Owino Madala is not his biological father but he is a brother to his father. That he and the Petitioner are related. Parcel North Sakwa/Ajigo/802 belong to the deceased who did not have children. That the deceased's wife Domtila was still alive when Protus entered the land and constructed a structure and that Protus occupation of the land is lawful. That there is also somebody by the name Kennedy Onyango who also resides on the same land and that he has no problem with him. That there is also Morrice Olal who also resides on the land to which he has no objection. That he is not aware that the Petitioner has sold the land to Clara Sharon Odhimbo and that he does not know if Kennedy Onyango has a title for his share. That it is not true that he and the Petitioner agreed on the filing of the succession cause. That it is not true that the Petitioner had taken care of the deceased's wife Domtila when she was still alive. That there was a family meeting with the chief North Sakwa and that he was present. That the Petitioner was to succeed parcel 802 and it was agreed by those present.

On re-examination, he maintained that he went for the chief's meeting over succession of parcel 836 and that parcel 802 was not discussed.

8. **Jared Otieno Ayanga (PW2)** adopted his statement dated 24/11/2021 wherein he had stated inter alia; that he is a step brother to the Objector since the Objector's father had inherited his mother and gave birth to him; that their grandfather had two children namely Oyomba Madala and Michael Owino Madala both of whom are deceased; that Michael Owino Madala was married to Domtila Ongala but were not blessed with children; that the Objector and the children of the late John Ayanga are the rightful beneficiaries of the estate of the late Owino Madala; that the Petitioner is not a member of the entire Madala family and who concealed material facts to the chief North Sakwa when he was seeking for the introductory letter.

On cross examination, he stated that he does not know how to read and write and that he usually puts in his initials or a thumb print to documents. That he recorded the statement in the presence of William Okello, Antony Opala and Siproso. That he knows both Martin Odongo and Peter Owino and who are members of his clan. That he is not aware if the Petitioner cared for Domtila after her husband died. That he is also not aware that chief North Sakwa held a meeting with the family members over succession of the estate of Owino Madala. That he knows the parcel of land in question in which one person has constructed thereon. He denied that other parcels have also constructed on the same land.

9. **Fred Okello (PW3)** adopted his statement dated 29/11/2021 as his evidence in chief which was a reiteration

of the statements of **Martin Odongo Oyomba (PW1)** and **Jared Otieno Ayanga (PW2)** which is word for word.

On cross examination he stated inter alia; that he was alone while recording his statement and that the statement was brought to him by Martin (Objector) and that he signed it; that he knows the parcel of land in question; that Michael Owino Madala used the land for a long period and that somebody later leased the land; that Peter Oketch (Petitioner) purchased a portion of land from one John Ayanga who is a brother to Martin Oyomba; that Martin Oyomba (Objector) would be lying if he says that he does not know his brother; that many people have constructed on parcel North Sakwa/Ajigo/802 for instance Protus lives on the land as well as Kennedy, Morrice Alal and Peter Owino having purchased the same; that Peter took the whole block by taking the portion he had purchased while trespassing and taking more land than he had bought; that he does not know the number of the parcel of land since he is not the surveyor; that he knows Domtila who was the wife of Michael Madala but who did not have children; that it is not true that Domtila introduced Peter Owino Oketch to the land; that he did not attend the meeting called by the North Sakwa chief since he did not call for such a meeting.

12. **Siprosa Ondethe (PW4)** adopted her statement dated 21/12/2021 as her evidence in chief which was a word for word replica of the statements by **Martin Odongo Oyomba(PW1), Jared Otieno Ayanga (PW2)** and **Fred Okello (PW3)**.

On cross examination, she stated that it is Martin Odongo who brought the written statement to her to sign. That she read the statement even though she is not learned and did not know the contents thereof. That she knows Mangula as one of the witnesses. That she is not aware that her statement is similar word for word with the other witness statements. That Martin and Peter are both her sons. That Martin is the son of to the brother of Owino Madala. Victor Oyomba is the nephew to Oyomba. That Victor's father is brother to Owino, that Victor, Peter Oketch, Martin and Owino Madala are related. That she does not know the parcel number but knows where it is. That she thinks some portion of the land have been sold but she does not know the people who bought the land.

On re-examination she stated that the Petitioner is not the biological son of Owino Madala but a son to the brother of Owino.

The Objector closed his case at that juncture.

14. **Peter Oketch (DW1)** adopted his affidavits sworn on 6/1/2022 and 23/2/2022 as his evidence in chief. He also relied on the annexures to the affidavits. That he and the Objector are first cousins and that Owino Madala is his uncle as well as to the Objector. That as per blood relation, he and the Objector are equal. That Owino Madala was married to Domtila and that Domtila died sometimes in 2018. That Owino Madala was not blessed with any child and that he adopted a child by the name James Ayanga Oyombe popularly known as John Ayanga. That the said James died in 2016 and that at the

time of filing the succession the parents of Owino Madala were not alive. That there were a series of meetings to appoint an administrator and that a meeting took place between him, Martin Odongo, Victor and two daughter of James Ayanga wherein he was appointed as administrator in April 2020. That in August another meeting was held and that he was proposed to go to the chief and an meeting was held in the chief's office where the issue of succession was deliberated and in which the Objector participated. That the parcels for succession were 836 and 802. That parcel 836 was allocated to him while parcel 802 there were people who had stayed on the land longer than himself and that he was to carry out succession and sub divide the land accordingly and that the same was done after the grant was confirmed. That he informed the Objector that he had completed the succession. That he was shocked to learn from the Objector that he had filed another succession which forced him now to file an objection. That the titles were processed for Protus, Morrice, Kennedy and himself. That due to the Objector's character, he decided to dispose his portion of land to Clara Sharon which created parcel Number North Sakwa/Ajigo/3493. That the Objector was paid Kshs70,000/= in 2004 to carry out succession but he failed to do so and that Domtila instructed him to do the succession. That parcel 802 was initially in the name of Owino Madala as at 1978. That due to fishy transactions on the register in the land's office they lodged a complaint with the land registrar which led to cancellation of titles. That the Objector filed succession cause No. 156 of 2020. That the objector has been

troublesome over the issue of succession and that all the family members avoided him and therefore he remained a lone ranger. That the tension on the land is still palpable as the Objector has threatened those in occupation. That he was the one who supported Domtila and that she bequeathed the land to him. That the Objector raised issues and demanded that he should pay for the land which he did by paying Kshs250,000/=. That the Objector has caused James Ayanga's family to lose the entitlement. That he urged the court to bring harmony to all those people living on the land away from the Objector.

On cross examination he stated that the first meeting was at Antony Opala's place, that the second was in Asembo and the third was held at Gobei. That he does not have minutes for the said meetings as they were family gathering but the topic of discussion was trying to resolve the issue on the succession cause. That he is the son to Joseph Oketch and that he has brothers and other siblings. That Oyomba is a son of Madala and that Madala is a son to Awino and that it was him who told the chief what to write in the letter he wrote. That he is related to Owino Madala which was made after they had already done the succession cause. That it was after thought after he told him that they wanted to do sub division. That he initiated his succession cause and that he was a witness to all those who purchased land in 802. That administratively locations changed until 2014 and that Ajigo was in North Sakwa and that all lands were under North Sakwa including their titles which reads North Sakwa/Ajigo and not Bondo township. That the

chief North Sakwa is about 100 metres from parcel 802. That chief North Sakwa knows the parcel 802 very well. That there is no law that states that for the chief to do the letter must be the chief on the land where it is situate. That he never raised an objection until the titles were out. That he would not blame the court for signing of another grant because the court would not know his intentions and the grant. That the processes are not fully synchronized as he sub divided the land to four people. That every time he visits his home ancestral home, he must pass through the home of Clara Sharon. That he sold the land to Sharon between December 2021 and concluded in 2022 and that he came and showed him the title in his land. That he reminded him that Domitila's wishes which was that all purchasers get their own titles and who began the sub division process which he objected. That he sees the map he has been shown and he cannot control if 802 is on that map or not as at 15/2/2022 and that perhaps the changes on the map did not happen as fast as he would want. That the land searchers show when the land was registered. That there was no court order to stop him from doing the sub division or acting on the land. That he knew Owino Madala as per his death certificate which is annexed in the petition and that he has enquired from him if he had the death certificate and who responded that he did not have. That he gave them a document to go and process the death certificate and that it is him who knows Martin Owino Madala. That there was initially Owino who had two sons namely Owino and Madala and that Madala sired Oyomba and Owino. Owino had one son who is his father

namely Oketch and Owino who is now deceased is a brother to Oyomba.

On re-examination, he stated that he is a direct beneficiary of the estate of Owino Madala. That Martin is not a direct beneficiary to the said estate. That he is claiming the land because Domitilah bequeathed it and that also he is a purchase of the said land. That Martin did succession cause No. 156 which he filed being aware that there was another cause having been part of the process from the chief's office. That it is not proper to file objection here and file another succession in the same court. that Martin was aware of this succession cause. That Martin filing multiple documents in a fresh succession and objection as him being a trickster. That the sub division of 802 began in December 2021 and that the surveyor went to the ground in December 2021. That he is not in charge of the allocating land number and any lapse therein is the fault of lands.

15. **Victor Oyomba (DW2)** testified that he sees his statement in court and that he signed it. That the Objector is his uncle and who is a brother to his father. That they live in the same compound and that he built a house in Martin's compound. That Peter Oketch is also his uncle. That North sakwa/Ajigo/802 was owned by Owino Madala who is deceased. That Domitilah and James sold the land to peter Oketch and that he was part of those who went to the chief. That his uncle Peter Martin, his step uncle and his sisters went to the chief together. That Peter Oketch was given authority

to file the petition and that Martin did not raise objection then. That his uncle Martin brought to the chief the documents which were used to process death certificate. That he was aware of succession cause 156 of 2020 which he listed as a beneficiary. That he is not part of succession 156 of 2020. That he is aware that he can benefit in succession 156 of 2020 relating to parcel 802. That his name and that of Martin appear in succession 156 of 2020. That they agreed in the chief's office that Peter would file succession of Owino Madala. That he has no grudge with his uncle Martin and that they spoke last on Tuesday 10/1/2023 requesting him to withdraw the objection. That his step mother Grace was with them and that Elizabeth was there as well. That he prays his statement to be considered.

On cross examination, he stated that he had built a house in his compound and that he was staying in Kisumu. That he works for his uncle Peter Oketch and that he sees his statement which he recorded with his advocate in Kisumu. That his father sold 836 to Owino Oketch which was in the name of James Ayanga. That 802 was in the name of Micah Owino Madala at the time he was recording the statement. That it is him who gave the chief the documents on the death certificate. That he also had his mother's death certificate which he gave the chief and that it was for succession of 836. That they sat at the chief's office and that he was present.

On re-examination, he stated that he knows about succession of 802 and that it was to be done by Peter Oketch. That Miah

owino Madala and Domitilah were the owners of 802. That the chief told them that they must do succession and that dead person cannot sell land. That they sat and agreed and that Martin gave Peter his parents' death certificates which was used to get the death certificate of Owino Madala which were given to them by their uncle Martin at the chief's office.

15. **Protas Migoye (DW3)** testified that he recorded his statement with the advocate and that he prays that the court adopts it as his evidence. That Martin Odongo called him and told him there was a land on sale and that they went and saw it. That Martin and his older brother sat down to agree on modalities of payment and that he eventually purchased it. That he lived on the land and that he has a title to the land which he got from Peter Oketch. That he knew how Peter got the title. That he did succession of that land and which process had been agreed by both Peter and Martin. That Martin cut down his fence recently and that he did not know the reason as to why he did so. That Victor is a son to Ayanga and that Peter and Martin are cousins.

On cross examination, he stated that North Sakwa/Ajigo/802 belonged to Domtila's husband and that he purchased land there. That it is him and Martin who spoke on succession process and that there was no sale agreement because they were good friends. That he recalls having a sit down and agreeing that Peter be an administrator. That they have three purchasers of that land. That it is only him out of the three who is in court today and that he does not know why the other

two are not in court. that he is a son to Oyomba Madala. That him and Peter are equal and so he cannot choose who is to enjoy 802. That he bought land from Ayanga, Domitilah and him.

On cross examination, he stated that North Sakwa belonged to Domtilah's husband and that he purchased the land. That it is him and Martin who spoke on the succession process. That there was no sale agreement because they were good friends. That he recalls having a sit down and agreeing that Peter to be the administrator. That he bought land from Ayanga, Domtilah and him.

10. The parties were directed to file and exchange written submissions. The learned trial magistrate later made a determination which has precipitated this appeal.
11. The appeal was canvassed by way of written submissions.
12. The Appellants submissions are dated 21st November 2025. The Appellant's submissions dwelt on her grounds of appeal.
13. The Counsel for the Appellant submitted that the core of his appeal lies in the learned magistrate's fundamental legal error in making damning findings of fact but then refusing to apply the clear and mandatory consequences prescribed by the Act as per ground 1, 2 and 3.

14. As regards the first ground, the learned magistrate found as a fact that the Respondent had misled the court by presentation of misleading facts as per paragraph 2 of page 109 of the record of appeal where her observation was that “the courts notes that indeed the Petitioner misled the court by stating that he was a son to the deceased however it is crucial that the court looks at the entirety of the case on its own circumstances.”

15. Counsel further stated that it was a classic definition of obtaining a grant fraudulently, a ground expressly stipulated in Section 76 (a) of the Act. Reliance was placed in **re Estate of the Late Chemase Ego (deceased) (Succession Cause 116 of 2000) [2025] KEHC 527 (KLR) (27 January 2025) (Ruling)**, where the court held that:

“A grant obtained through concealment of matter or false allegation is liable to be revoked.” The finding of fraud vitiates the entire grant, rendering it a nullity.

Further, it was submitted that, the learned magistrate’s subsequent act of merely invalidating the grant instead of formally revoking it under Section 76, was a failure to apply the law correctly to her own finding.

16. On the second and third ground, counsel submitted that the learned magistrate found that the Respondent had “intermeddled with the estate of the deceased.” That this is the direct breach of the absolute prohibition under Section 45

(1) of the Act. Section 45 is not a mere guideline; it is a provision with criminal and civil consequences under Section 45(2). That in paragraph 6 of the ruling, the learned magistrate opined that:

“The Petitioner upon receiving the confirmed grant proceeded to sub divide the land into four portions and transferred three to he purchasers and one portion to himself.”

..... The sale was illegal however the transfer, in my considered opinion was legal, after confirmation of grant.

Counsel stated that excerpt above without a doubt show that the finding is a logical and legal fallacy. That the learned magistrate did fundamentally misunderstand the nature of a property transaction. A “sale” and “transfer” are not severable distinct events in this context; they are cause and effect. That the sale is the contract that gives rise to he obligation to transfer while the transfer is the execution and completion of that very sale agreement.

a) The illegal sale taints the subsequent transfer. It is trite principle of law that an illegal contract cannot fund a lawful action. That the Magistrate’s finding the underlying sale was illegal means that het entire foundation for the transfer is rotten. That a court of law cannot countenance the enforcement of an illegal agreement. To hold that the transfer which is the fruit of the poisonous tree is legal, is a grave

error. As held in the case of **Haile Menkerios v Murieith & another; Wina Trading Company Limited & Another (Third Party) (Civil Suit 197 of 2018) [2024] KEHC 13993 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)**, the court will not lend their aid to enforce an illegal transaction. (See paragraph 15 of the judgment).

- b) The transfer was the culmination of the intermeddling: the act of “transferring” the title was the final and most definitive act of the intermeddling. It permanently alienated the estate property illegally (without authority) and then used the confirmed grant to execute the transfer, thereby completing the illegal sale.
- c) That the proper legal course of action for administrator is to first obtain a confirmed grant that specifically provides for the sale of that asset and then to sell and transfer it. To reverse this process is to act in an “improper manner” as provided under Section 76 (b) of the Law of Succession Act.
- d) The confirmed grant cannot be used as an instrument to ratify an otherwise unlawful and pre-existing contract. The purchasers, having participated in an illegal purchase from a person they knew or ought to have known lacked the immediate authority to sell, cannot hide behind the subsequent confirmation. Their status as

intermeddlers was fixed at the moment of the illegal sale.

17. Also, it was submitted that the learned magistrate's finding is internally inconsistent and legally unsustainable. That it is akin to declaring that a thief's act of stealing was illegal, but his subsequent act of selling the stolen property was legal. That the two acts are inextricably linked. That the transfer was the direct result and completion of the illegal sale and that to validate the transfer is to necessarily validate the sale, which the magistrate herself declared illegal.
18. Further, reliance was placed in the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Othes [2015] KEELC 151 (KLR)**, where the court was categorical that ***“any person who intermeddles with the estate of a deceased person is.. guilty of an offence. It follows that any transaction undertaken by such a person before obtaining a grant is illegal and therefore null and void.*** The act of intermeddling and the subsequent transactions are tainted by illegal and cannot be sanitized by the court.
19. As regards the fifth ground, on the improper use of Rule 73 to subvert substantive law as stated in paragraph 2 of page 110 of the record of appeal, it was submitted that the learned trial magistrate attempted to use Rule 73 of the Probate and Administrative Rules as a “magic wand” to cure the incurable defects in the Respondent's conduct. That rule 73 is a procedural rule that preserves the court's

inherent power to ensure justice and prevent abuse of process.

Further, counsel stated that this inherent power cannot be exercised in violation of express statutory provisions. Reliance was placed in the case of Supreme Court of Kenya in **Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)** where the Court held that “a court’s jurisdiction flows from either the Constitution or legislation or both. It cannot confer jurisdiction upon itself.” Similarly, a court cannot use a procedural rule to override substantive rights and prohibitions created by an Act of Parliament. To use Rule 73 to validate actions expressly forbidden by Section 45 and 82 of the Act is a gross misapplication of the law. The decision in **Equity Bank Limited v West Link Mbo Limited (Civil Application 78 of 2011) [2013] KECA 320 (Civ) (31 May 2013) (Ruling)** cautions against the wide use of inherent powers, stating they must be exercised within the confines of the law.

20. Further, on ground 7: failure to hold that the Objection was merited, counsel submitted that the learned trial magistrate committed a fatal and fundamental error in confirming a joint grant solely in the name of one administrator. That the record demonstrates an inexplicable and unlawful deviation from the grant that was issued. That whereas the Grant of Letters of Administration Intestate was issued in the joint names of the Appellant and the Respondent (as outlined on page 27 of the

record of Appeal) the subsequent certificate of confirmation of Grant was issued solely in the name of the Respondent.

21. Counsel further submitted that a joint grant cannot be confirmed unilaterally without the consent of all co-administrators. The law regarding the confirmation of a grant issued to multiple administrators is unequivocal. That Section 71 of the Law of Succession Act and Rule 40 (6) and (8) of the Probate and Administration Rules mandate that for a grant to be confirmed, the application must be made by or with the consent of all the grantees, or the court must be satisfied as to the reasons why any co-grantee has not consented.
22. Counsel placed reliance in the matter of the **Estate of Charles Murgor (deceased) [2009] eKLR** was explicit ***“where a grant has been made more than one administrator, the application for its confirmation must be by all of them... A grant made to two administrators is one and indivisible and cannot be confirmed at the instance of one of them to the exclusion of the other.”***

It was also submitted that in this case the Respondent applied for confirmation of the joint grant without the Appellant’s consent. That the learned trial magistrate in granting this application effectively severed the joint grant and stripped the Appellant of his rights and duties as a co-administrator without any legal basis. That this action was ultra vires and a nullity. Further, it was submitted that the trial court failed to in its

duty to inquire into the Appellant's absence. That the Probate court is not a passive registry it is a court of conscience with a supervisory jurisdiction over administrators. Rule 40 (8) imposes a duty on the court; where a grant is made to two or more persons and one of them fails to join in an application for confirmation, the court must direct the Applicant to serve the non-consenting administrator and then inquire into the cause of the failure. It was further submitted that the learned magistrate made no such inquiry and that the court did not ask the reasons as to why the Appellant, a joint grantee, not applying for confirmation, had he been served with the application for confirmation, did he consent to the proposed mode of distribution and whether there existed any disputes between the administrators. That failure to conduct a mandatory inquiry is a grave procedural irregularity that breaches the principles of natural justice and renders the confirmation order fundamentally flawed.

Again, counsel submitted that the confirmation of the sole name of the Respondent was a de facto revocation of the Appellant's grant without due process. That confirming a grant solely in the Respondent's name, the learned magistrate effectively revoked the Appellant's grant without a formal application, without just cause and without affording the Appellant a hearing. That it is a gross violation of the Appellant's right to be heard as guaranteed under Article 50 of the Constitution and the principles of administrative justice under Article 47.

23. As regards the eight ground of addressing issues and pleadings not before the court and considering extraneous matters and thus failing to apply her mind correctly, it was submitted that the learned trial magistrate in concluding her ruling proceeded to dismiss Bondo Succession Cause No. E156/2020 which was not before her for determination and the Objection herein which is now the subject of the present appeal. That the simultaneous existence of two petitions presented the court with an irreconcilable contradiction. That the Appellant's Petition was succession cause No. 156 of 2020 whilst the Respondent's Petition Succession Cause No. 256 of 2020. The Appellant's petition was therefore without a doubt first in time. Further, it was submitted that by filing of Succession Cause No. 156 of 2020 was not just a prior claim and that it was a fact of which the court itself had record. That prior to filing, served as constructive notice to the Court that the Appellant was asserting his own rights to the estate and was highly unlikely to have consented to the Respondent's parallel petition.

24. Again, it was submitted that courts are not passive spectators and that they have a duty to manage their processes and prevent abuse. Counsel placed reliance in the case of **Abdul v Mokuia (Civil Appeal E077/2023) [2025] KEHC 4105 (KLR) (1 April 2025) (Judgement)** where the court held that a judicial officer must consider all relevant evidence before them, even if not explicitly argued in a particular way. That the learned trial magistrate thus failed to

exercise this basic judicial function by not investing the authenticity of the Respondent's documents in light of the Appellant's competing prior claim. That the Appellant was acting in person before the trial court and that while the term forgery may not have been explicitly uttered, the factual matrix presented to the trial court was so compelling that it pointed unequivocally to the conclusion that the Respondent's petition was founded on fraudulent documents and which was the basis of the objection. That the Appellant's attempt at prosecution of his own, earlier in time succession cause was de facto evidence that he could not have consented to the Respondent's cause.

25. It was further submitted that the learned trial magistrate thus committed a fatal procedural error by failing to scrutinize the foundation documents in the Respondent's succession cause. That the Appellant contends that the trial court failed in its fundamental duty to examine Forms P&A 80, P&A 5, and P&A 12 to confirm that they were not signed by the Respondent and make a finding that the purported signature of the Appellant was a forgery. That this failure led to court to uphold a grant that was procedurally void from its inception and that by proceeding to confirm the grant without first resolving the fundamental question of whether the Petition was founded on genuine documents, the learned magistrate presided over a flawed process. That the objection was properly before her and its central premise the invalidity of the Respondent's document was supported by compelling

objective evidence (the existence of the first-in-time petition). That her failure to analyze Form P&A 80, 5 and 12 in this context was a fatal error that goes to the root of the fairness of the trial.

26. Finally, it was submitted that the learned trial magistrate erred by treating the Appellant's objection as a mere technicality, rather than recognizing it as a challenge to the very legitimacy of the Respondent's cause and that the evidence of the Appellant's prior filing made it apparent that the Respondent's petition was problematic and that the court's duty was to scrutinize the documents and uphold the integrity of its process, which it failed to do. Further, the Appellant prays that the appeal be allowed entirely, the ruling and order of the trial magistrate delivered on 31/5/2023 be set aside and be substituted thereof with an order allowing the Appellant's Summons for Revocation of Grant dated 21/1/2023.

27. The Respondent's submissions are dated 19th January 2025.

28. The Respondent raised two issues for determination namely whether the trial court erred when it failed to revoke the grant under Section 76 of the Law of Succession Act and secondly whether the Appellant has discharged the burden of proof regarding the claims raised in his Summons for revocation of grant dated 21/12/2021.

29. As regards the first issue, it was submitted that the proceedings conducted by the trial court regarding the

relationship of the Respondent and the deceased is that the Respondent is a nephew of the deceased which relationship was conceded by the Appellant. Further the Appellant and his witnesses confirmed that there was a family meeting at the chief's office where the Respondent was authorized to commence succession cause on the estate of the deceased and that the Appellant provided him with a copy of the burial permit in order to obtain the certificate of death. It was also submitted that the power to revoke a grant under Section 76 of the Act by a court is discretionary. Reliance was placed in the case of **Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa Succession Cause No. 158 of 2000** where Mwita J, (as he then was) held as follows:

“Power to revoke a grant is discretionary and that the same must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

It was finally submitted that the conduct of the Appellant in participating in the family meeting and agreeing to have the

Respondent file a succession cause and then turning around to challenge it shows that he was acting in bad faith. This can be seen by the fact that he went ahead and filed his own separate succession cause Number E136/2020 when he could as well have presented his issues in the succession Cause that has already been filed. Hence, the trial court properly found that the Appellant was abusing the court process.

30. As regards the second issue, it was submitted that the Appellant was under obligation to prove his case on a balance of probability and in accordance with the provisions of Section 107 and 108 of the Evidence Act which provides as follows:

107 - Burden of proof

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

2) Where a person is bound to prove existence of any fact it is said that the burden of proof lies on that person.

108 - Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

It was submitted that the Appellant made mere allegations which were not substantiated whereas the evidence of the Respondent was cogent and corroborated. It can be seen

from the evidence of the Respondent's witness (DW2) who testified that the Appellant was present at the chief's office North Sakwa and that he agreed to the proposal by the family that the Respondent be made an administrator and to institute the succession cause. Further, the Respondent's witness (DW3) testified that the Appellant was the one who informed him about the land sale and that the Appellant was also involved in the said transaction.

31. The Appellant in the lower court claimed that the Respondent had engaged in intermeddling with the estate of the deceased but failed to present sufficient evidence. The Respondent upon obtaining the confirmed grant, teamed up with other family members and ensured that the persons who had entered the land were enabled to acquire ownership of their portions. Indeed, upon the issuance of a confirmed grant, Section 93 of the Law of Succession Act permitted the Respondent to engage with purchasers. Section 93 of the said Act provides as follows:

“Transfers of any interest in property made to a purchaser by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant.”

It was finally submitted that the trial court properly considered the issues and arrived at a proper verdict. The Respondent therefore urged the court to dismiss the appeal with costs.

32. I have considered the record of appeal as well as the rival submissions. I find the issue for determination is whether the appeal has merit. It is not in dispute that the Appellant herein had filed Succession Cause No. 156 of 2020 over the same estate of the deceased and which has not been determined. It is also not in dispute that the Respondent herein had lodged Succession Cause 251 of 2020 over the same estate and which formed proceedings which has precipitated this appeal. It is also not in dispute that the trial court dismissed succession Cause No. 156/2020 yet the same had not been placed before her and that the said court did not determine the issue of the existence of the two succession causes and whether the same were to be consolidated. I find the issue for determination is whether the appeal has merit.

33. It is noted that the Appellant had filed a summons for revocation of grant before the trial court dated 21/12/2021 where he sought for the revocation of the grant that had been issued to the Respondent and that title to LR No. North Sakwa/Ajigo/802 be revoked and the same to revert in the names of the deceased Michael Owino Madala and be made available for distribution to the beneficiaries. The trial court therefore was mandated to establish whether the Appellant had satisfied conditions imposed by Section 76 of the Law of Succession Act which provides as follows:

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court

decides, either on application by any interested party or of its own motion-

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

i) to apply for the confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii) to proceed diligently with the administration of the estate; or

iii) to produce to the court, within the time prescribed, any such inventory or account of administration as required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

34. It is noted that the Respondent while filing the succession cause No. 251/2020 had indicated himself as a son of the

deceased while in actual fact that he was a nephew and ranked in the same priority with the Objector herein. Indeed, the learned trial magistrate confirmed that the Respondent had given misleading information when he claimed that he was a son of the deceased when the converse was true. The learned magistrate found as a fact that the Respondent had misled the court by presentation of misleading facts which can be seen vide paragraph 2 of page 109 of the Record of Appeal where she observed thus **“the court notes that indeed the Petitioner misled the court by stating that he was a son to the deceased however it is crucial that the court looks at the entirety of the case on its own circumstances.”**

It was contended by counsel for the Appellant that this was a good ground warranting revocation of the grant but which the trial court brushed it aside. In the case of **re Estate of the Late Chemase Ego (deceased) (Succession Cause 116 of 2000) [2025] KEHC 527 (KLR) (27 January 2025) (Ruling)**, the court held that:

“A grant obtained through concealment of a matter or false allegation is liable to be revoked.”

The conventional view is that a finding of fraud vitiates an entire grant, rendering it a nullity. Hence, the learned trial magistrate ought to have established that the Respondent had fraudulently given false information to the court while filing the succession cause and proceed to revoke the grant as sought. In the case of **Albert Imbuga Kisigwa Vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000**, Mwita J (as he then was) held that the power to

revoke a grant is discretionary and which must be exercised judiciously and only on sound grounds and that it must not be exercised whimsically or capriciously.

Whereas learned counsel for the Respondent submits that the learned trial magistrate resorted to the provisions of Rule 73 of the Probate and Administration Rules to do justice in the circumstances after the Appellant admitted having participated in a family meeting, I find the application of the said Rule should not be used as a panacea of all ills in matters succession. Indeed, it transpired that the Respondent and others had already engaged in sale transactions over the subject property belonging to the deceased even prior to the confirmation of the grant and that this was improper as it amounted to intermeddling of the estate.

35. As regards the issue of intermeddling of the estate, section 45 of the Law of Succession Act provides as follows:

(1) Except so far as expressly authorized by this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

From the foregoing provision as juxtaposed with the evidence presented before the trial court, it is clear that indeed there was intermeddling with the estate of the deceased and which was appreciated by the learned trial magistrate when she stated in her ruling that the sale was illegal but that following the transfer after confirmation of the grant the same became legal. I find that the learned trial magistrate went into error in that having established that there was intermeddling in the initial stage, the purported confirmed grant did not legitimize or whitewash an illegality. It must be noted that prior to the filing of the succession cause, the Respondent had already engaged in sale transactions and that several purchasers were brought in and who took possession of the deceased's parcel of land North Sakwa/Ajigo/802 and that the Respondent upon obtaining the confirmed grant proceeded to transfer the properties to the purchasers. Even though learned counsel for the Respondent has sought refuge under section 93 of the said Act to the effect that the transactions entered into after a confirmed grant, the same is not convincing in view of the fact that the initial sale and purchase was irregular as it violated the provisions of section 45 of the Act and hence, the confirmed grant could not correct activities that were faulty and in violation of the law. I find therefore that the learned trial magistrate fell into error when she okayed the actions of

the Respondent as the illegal sale taints the subsequent transfer. It is trite that an illegal contract cannot found a lawful action and that a court of law cannot countenance the enforcement of an illegal agreement. To hold otherwise was a grave error by the learned trial magistrate. As held in the case of **Haile Menkerios v Murieith & another; Wina Trading Company Limited & Another (Third Party) (Civil Suit 197 of 2018) [2024] KEHC 13993 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)**, the court will not lend its aid to enforce an illegal transaction.

The Respondent is of the view that he later obtained the confirmed grant and then went ahead to conclude the transaction by effecting transfer of the property to the purchasers. However, it must be noted that the transfer was the culmination of the intermeddling and that the act of “transferring” the title was the final and most definitive act of the intermeddling. I find the action of the Respondent permanently alienated the estate property illegally (without authority) and then used the confirmed grant to execute the transfer, thereby completing the illegal sale. If the Respondent wanted to do a clean transaction or deal, he ought to follow the proper legal course of action by first obtaining the grant and then seek to have it a confirmed grant then seek to sell and transfer it. The confirmed grant cannot be used as an instrument to ratify an otherwise unlawful and pre-existing contract. The purchasers, having participated in an illegal purchase from a person they knew or ought to have known lacked the immediate authority to sell, cannot hide behind the

subsequent confirmation. Their status as intermeddlers kicked off the moment the illegal sale transactions took place and thus the transfer could not legitimize it as the same was already tainted by an illegality.

36. It is noted that the learned trial magistrate in concluding her ruling proceeded to dismiss Bondo Succession Cause No. E156/2020 which was not before her for determination as the Objection herein only related to succession cause number 251 of 2020 which is now the subject of the present appeal. It is quite clear that the simultaneous existence of two petitions presented the trial court with an irreconcilable contradiction in that the Appellant's Petition was succession cause No. 156 of 2020 whilst the Respondent's Petition was Succession Cause No. 256 of 2020. There is no evidence that the trial court bothered to engage the parties over the existence of the two succession causes and the need to consolidate them as one or have one of them withdrawn and or abandoned so that the trial court could substantially determine the issues in contention once and for all. I find that it was erroneous on the part of the learned trial magistrate to dismiss the Appellant's succession cause number 156 of 2020 yet the same was not before her and did not know the progress of the same. It was necessary for the trial court to hear the parties in that succession matter before making the orders that she made. The trial court therefore condemned the parties in that case without affording them an opportunity to ventilate their case. It is also not in dispute that the Appellant's petition was without a doubt the first one to be filed. The trial court

therefore was required to give directions as to how the two cases were to be determined as both the parties sought to administer and distribute the only estate of the deceased namely North Sakwa/Ajigo/802.

37. An analysis of the entire record of appeal and the rival submissions leaves no doubt that the Appellant had presented a credible objection to the grant issued to the Respondent. I am satisfied that the Respondent had intermeddled with the estate of the deceased by first engaging in sale transactions over the property of the deceased without first obtaining a grant and having it confirmed. Further, it is noted that even the purported purchasers were not involved in the proceedings even as interested parties so that they could contest the objection raised by the Appellant herein. The fact of the existence of another succession cause number 156 of 2020 which was not determined warrants this court to interfere with the orders of the trial court so that the parties herein and any interested party could be given an opportunity to ventilate their issues and thereafter the matter could be determined substantially on merit. I am of the considered view that since the parties herein rank in priority, a fresh grant be issued in their names and that they file fresh summons for confirmation and while at it, the trial court could give directions regarding the pendency of succession cause number 156 of 2020. In order to arrest the situation and to restore the property of the deceased for distribution among the beneficiaries, it is appropriate to order for cancellation of the new titles and the same to revert in the name of the deceased.

38. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The ruling and order of the trial magistrate delivered on 31/5/2023 is hereby set aside and is substituted with an order allowing the Appellant's Summons for Revocation of Grant dated 21/12/2021 in the following terms:

i) The grant issued to the Respondent issued on 26/1/2021 is hereby revoked.

ii) The certificate of confirmation of grant issued to the Respondent on 28/7/2021 is hereby cancelled.

iii) The order dismissing Succession Cause No. 156 of 2020 is hereby vacated and that the same is reinstated.

iv) A fresh grant be and is hereby issued in the joint names of the Respondent and Appellant herein forthwith and who are ordered to file fresh summons for confirmation of the fresh grant within thirty (30) days upon issuance of the fresh grant.

v) The new titles emanating from LR No. North Sakwa/Ajigo/802 are hereby ordered cancelled and that the same are ordered to revert in the name of the deceased Michael Owino Madala and be made available for distribution among the beneficiaries.

vi) Parties herein to take directions regarding Succession Cause No. 156 of 2020 before the trial court.

vii) As parties are members of one family, i order each to bear their own costs of the appeal as well as in the lower court.

Dated and delivered virtually at Naivasha this 24th day

of March 2026.

D. K. KEMEI

JUDGE

In the presence of:

N/A Odongo.....for Appellant

N/A Omondi Abande.....for Respondent

Maureen.....Court Assistant